Blank Page

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 10 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

No. [redacted] 74

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY,
RESPONDENT.

PETITION FOR WRIT OF ERROR AND SUPPORTING BRIEF AND ARGUMENT.

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

With him on Brief
R. E. CULVER,
BENJAMIN PHILLIP,
St. Joseph, Missouri.

Blank Page

INDEX

Petition for Writ of Certiorari 1

Opinion of Circuit Court of Appeals (Record 109-127) 1

Judgment of United States Circuit Court of Appeals (Record 128)

Reasons for Allowance of This Writ 7

Brief in Support of Petition 13

Argument—

I. The Missouri law governs 13

II. The finding of the district court was binding on the court below if there was substantial evidence to support it 13

III. The court below failed and refused to follow the law of Missouri declared both by its Supreme Court and its courts of appeals, and in holding it was not bound by the decisions of the latter courts, the ruling below is in conflict with the decisions of this court and the Circuit Courts of Appeals for the Second, Third, Seventh and Ninth Circuits 14

IV. In the absence of a contrary decision of the state Supreme Court, the Missouri courts of appeals are courts of last resort and declare the law of the state 15

V. In ruling that the policies are unambiguous, the decision of the court below is in conflict with the decisions of the Supreme Court of Missouri 28

VI. In its findings of fact the court below completely disregarded the undisputed evidence, and misconstrued the Missouri cases 33

VII. In ordering the district court to enter a declaratory judgment in favor of respondent, without evidence to prove the jurisdictional amount in dispute, the decision of the court below is in conflict with the decisions of this court 41

TABLE OF CASES

Barcolini vs. Atlantic City S. R. Co., 82 N. J. L. 107 18

Barton vs. Metropolitan L. Ins. Co., (St. Louis, 1937) 103 S. W. 2d 889 ..... 10, 28

Bellows vs. Travelers Ins. Co., 203 S. W. 978 ..... 11, 27, 29, 32

Berlet vs. Lehigh Valley Silk Mills, (C. C. A. 3) 287 Fed. 769 ..... 8, 19

Blair vs. Com. of Internal Revenue, 300 U. S. 5-14 9

Burns vs. Aetna Life Ins. Co., (St. Louis, 1939) 123 S. W. 2d 185, l. c. 191 ..... 10, 25, 28

Cravens vs. New York Life Ins. Co., 148 Mo. 583, (Aff.) 178 U. S. 583 13

Curreri vs. Vice, (C. C. A. 9) 77 F. 2d 130 ..... 9, 22-23

Erie R. Co. vs. Tompkins, 304 U. S. 64, 82 L. Ed. 1188 ..... 7, 9, 15

Erie Railroad Co. vs. Hilt, 247 U. S. 97 ..... 9, 18, 19

Erie Railroad Co. vs. Duplak, 286 U. S. 440-444 9

Ex parte Zimmerman, (C. C. A. 3) 48 F. 2d 76 ..... 8, 22

Equitable Life Assur. Society vs. Bomar, 106 F. 2d 640 37

Fairchild vs. Lohman, 13 F. 2d 252, l. c. 254 ..... 16, 17

Fogelsong vs. Modern Brotherhood of America, (Kansas City, 1906) 121 Mo. App. 548 ..... 9, 26, 27, 33, 35, 37

Heald vs. Aetna Life Ins. Co., (Kansas City, 1935) 90 S. W. 2d 797; affirmed 340 Mo. 1143 ..... 10, 27, 28, 35, 41

Hudson et al., Exrx., vs. Moonier, 304 U. S. 397 ..... 9, 24

In re Gilligan, Troy Wagon Works Co. vs. Hancock, (C. C. A. 7) 152 Fed. 605 ..... 8, 20

In re Kountze Bros., City of Los Angeles vs. Irving Trust Co., (C. C. A. 2) 103 F. 2d 785, l. c. 789 ..... 8, 24

James vs. Casualty Co., (Kansas City, 1905) 113 Mo. App. 622 ..... 9, 26, 27, 33

John T. Porter Co. vs. Java Cocoanut Oil Co., (C. C. A. 9) 4 F. 2d 476 9

Kane vs. Metropolitan Life Ins. Co., (Springfield, 1934) 228 Mo. App. 649 ..... 10, 28, 30

Katz vs. Union Central Life Ins. Co., (Kansas City, 1931) 226 Mo. App. 618 ..... 10, 27

Kaufman & Baer vs. Monroe Motor Line Co., 124 Pa. Super. 27 21

Kvos vs. Associated Press, 299 U. S. 269 ..... 11, 41, 43

Masino vs. West Jersey & S. R. R. Co., (C. C. A. 3) 41 F. 2d 645 ..... 8, 22

McNutt vs. General Motors Acceptance Corporation, 298 U. S. 178 ..... 11, 41, 42

Moss vs. Metropolitan L. Ins. Co., (St. Louis, 1935) 230 Mo. App. 70 ..... 10, 28, 32

Mutual Life Ins. Co. vs. Johnson, 293 U. S. 335, 79 L. Ed. 398 13

Myers vs. Ocean Acc. Corp., 99 F. 2d 485, l. c. 488 13

New York Life vs. Stoner, 109 F. 2d 874 ..... 1, 7

New York Life Ins. Co. vs. Levin, 102 F. 2d 403, 405 13

North Philadelphia Trust Co. vs. Smith, (C. C. A. 3) 13 F. 2d 585 ..... 8, 20

Northwestern Mutual Life Ins. Co. vs. McCue, 223 U. S. 234, 56 L. Ed. 419 13

Pogue vs. Metropolitan L. Ins. Co., (St. Louis, 1937) 107 S. W. 2d 144 ..... 10, 26, 28

Prange vs. International Life Insurance Company, 329 Mo. 651 4

Rickey vs. N. Y. Life Ins. Co., (St. Louis, 1934) 229 Mo. App. 1226 ..... 10, 28

Ruhlin vs. New York Life Ins. Co., 304 U. S. 202, l. c. 209 ..... 9, 24

Shaw vs. U. S. Fidelity & G. Co., 101 F. 2d 92, l. c. 96 13

Staten Island Cricket & Baseball Club vs. Farmers Loan & Trust Co., 58 N. Y. S. 460 24

State ex rel. vs. Allen, 337 Mo. 525, reviewing on certiorari decision of Springfield Court of Appeals in Kane vs. Metropolitan Life Ins. Co., 228 Mo. App. 649 ..... 10, 11, 28, 29, 30

State ex rel. Commonwealth Casualty Company vs. Cox, 322 Mo. 38 4

State vs. Fidelity & Deposit Co., 99 S. W. 2d 476, l. c. 478 25

State Farm Mutual Auto Ins. Co. vs. Coghran, 303 U. S. 485, 82 L. Ed. 970 14

State ex rel. vs. Hostetter, 338 Mo. 589, reviewing on certiorari decision St. Louis Court of Appeals in Moss vs. Metropolitan Life Ins. Co., 230 Mo. App. 70 ..... 10, 11, 28, 29, 32

State ex rel. Mutual Benefit Association vs. Trimble, 334 Mo. 920 4

State ex rel. New York Life Ins. Co. vs. Shain (see Appendixes A and B) 11, 28

State ex rel. Packing Co. vs. Reynolds, 287 Mo. 697, l. c. 710 16

State ex rel. Security Insurance Co. vs. Trimble, 318 Mo. 173, l. c. 178 ..... 16, 17

State ex rel. Winters vs. Trimble, 315 Mo. 1295, l. c. 1301 ..... 16, 17

Stoner vs. N. Y. Life Ins. Co., (Kansas City, 1936) 90 S. W. 2d 784 ..... 9, 14, 27, 29, 45

Stoner vs. N. Y. Life Ins. Co., (Kansas City, 1938) 114 S. W. 2d 167 ..... 9, 14, 27

Stoner vs. New York Life Insurance Company, 90 S. W. 2d 784 ..... 3, 6

Stoner vs. New York Life Insurance Company, 114 S. W. 2d 167 ..... 3, 6

Taplinger vs. Northwestern Natl. Bank, (C. C. A. 3) 101 F. 2d 274, l. c. 278 ..... 8, 21

Wall vs. Casualty Co., (St. Louis, 1905) 111 Mo. App. 504 ..... 9, 27, 33

Young vs. Metropolitan L. Ins. Co., (Springfield, 1935) 84 S. W. 2d 1065 ..... 10, 28

STATUTES

R. S. Mo., 1929, Sec. 1914 16

Blank Page

Supreme Court of the United States

No. _____

LEWIS K. STONER, PETITIONER,

VS.

NEW YORK LIFE INSURANCE COMPANY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

The petition of Lewis K. Stoner respectfully shows to this court that:

1. Petitioner seeks to review the final decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit in an action at law for a declaratory judgment, reversing the judgment of the District Court of the United States, for the Western District of Missouri in favor of petitioner, with directions to enter a declaratory judgment in favor of respondent (*New York Life Ins. Co.* v. *Stoner*, 109 F. 2d 874).

The judgment below was rendered February 19, 1940, and the petition for rehearing denied March 22, 1940.

2. On different dates prior to June 29, 1931, respondent delivered to petitioner in Missouri, where they were applied for and where the premiums were paid (Rec. 25), four policies, identical (save as to beneficiaries and the amounts payable at death), by which it agreed to pay petitioner in Missouri stipulated monthly income benefits during the period of continuous total and presumably permanent disability resulting from accident or disease. Each policy provided that "disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from performing any work, from following any occupation or from engaging in any business for remuneration or profit" (Rec. 21-25).

3. On June 29, 1931, petitioner was accidentally injured (Rec. 6). Prior to the institution of this action, petitioner instituted a suit in the Circuit Court of Buchanan County, Missouri, against respondent on the four policies, to recover disability benefits claimed by him to be due for total disability during the period intervening between September 29, 1933, and March 29, 1934, on account of that accident (Rec. 7). Thereafter, and before the beginning of this action, petitioner instituted two additional suits, one in said circuit court on two of the policies and one in the Circuit Court of Platte County, Missouri, on the remaining two policies to recover disability benefits claimed by him to be due on account of the same accident for the period inter-

vening between April 29, 1934, and May 29, 1936 (Rec. 7). The Buchanan County and the Platte County (removed to Daviess County) cases were tried. Both were appealed to the Kansas City Court of Appeals. The facts shown in the record in both cases were the same. The sole defense was that petitioner was not "totally disabled" within the meaning of the policies; and on both appeals respondent insisted that a demurrer to the evidence should have been given, because there was no substantial testimony sufficient to sustain a finding of total disability and because the testimony showed affirmatively and conclusively that petitioner was not totally disabled within the meaning of the terms of the policies. In both cases the Kansas City Court of Appeals held upon the authority of an unbroken line of Missouri cases covering a period of more than a third of a century, that (a) the policies were not to be construed literally, and to be totally disabled within the meaning of the policies it was not necessary that the insured should be rendered utterly helpless and unable to do and perform any act or acts in connection with his occupation, but that if he were unable to substantially perform the material duties connected with his occupation in the customary and usual manner, then he was totally disabled; and (b) that the evidence was sufficient to sustain the finding that the insured was totally disabled (Buchanan County case, *Stoner* v. *New York Life Insurance Company*, decided January 27, 1936, 90 S. W. 2d 784; Daviess County case, *Stoner* v. *New York Life Insurance Company*, decided January 31, 1938, 114 S. W. 2d 167).

4. On February 21, 1936, respondent applied to the Supreme Court of Missouri for a writ of certiorari to review and quash the opinion of the Kansas City Court of Appeals in the *Buchanan* County case, on the ground the terms of the policies were plain and unambiguous and in construing them the Kansas City Court of Appeals had exceeded its lawful jurisdiction in that it failed and refused to follow the last controlling decisions of the Supreme Court in *State ex rel. Mutual Benefit Association* v. *Trimble*, 334 Mo. 920; *Prange* v. *International Life Insurance Company*, 329 Mo. 651; and *State ex rel. Commonwealth Casualty Company* v. *Cox*, 322 Mo. 38, wherein the Supreme Court held that where the language of the policy of insurance is without ambiguity, there is no room for construction but the unequivocal language is to be given its plain meaning (copy of petition and suggestions in support shown in appendix to supporting Brief, identified as "A"). The Supreme Court denied the writ (copy of judgment shown in appendix to supporting Brief identified as "B").

5. On January 8, 1938, respondent filed this action at law for a declaratory judgment, alleging in the petition there was an existing controversy between it and petitioner involving more than $3,000.00, as follows: Petitioner was claiming that as the result of the accidental injury heretofore mentioned, he was totally disabled during the period intervening between May 29, 1936, and January 7, 1938, and respondent was liable to him on the four policies heretofore mentioned for

disability benefits accrued during that period, amounting to $2,375.00; and respondent also was claiming and demanding repayment of premiums amounting to $790.70 paid by him on the policies during the same period, in all the sum of $3,165.70, while respondent claimed petitioner was not totally disabled and for that reason denied it was liable to him either for the disability benefits or the premiums paid (Rec. 2, 8). The answer denied there was an existing controversy involving more than $3,000.00 and for that reason denied the jurisdiction of the court (Rec. 9, 15). The answer admitted there was an existing controversy with respect to respondent's liability for the accrued disability benefits amounting to $2,375.00 and alleged that was the sole controversy. The answer specifically denied petitioner was claiming or demanding or ever had claimed or demanded repayment of the $790.70 premiums paid and denied there was then or ever had been any controversy with respect thereto (Rec. 15).

6. A jury was waived (Rec. 20). The parties stipulated that either party might introduce in evidence any of the evidence or documents contained in the printed transcript of the record in either of the two Stoner cases above mentioned in the Kansas City Court of Appeals with the same effect as if the testimony were given by the witness on the witness stand, the same evidence read from one record not to be offered from the other (Rec. 21). To sustain its case, respondent introduced and relied only on the evidence contained in the transcript of the record in the Daviess County

case which appears on pages 25-73 of the record. A comparison of the facts in that record, with the facts stated by the court in the Buchanan County case (90 S. W. 2d 784) shows that the evidence in both cases is the same and the court in the Daviess County case so stated (114 S. W. 2d 168).

7. Respondent made no effort to prove, and there is no evidence in the record to show petitioner ever claimed or demanded payment of the $790.70 premiums paid by him or that there was or ever had been any controversy as to his right thereto (see Record). At the close of respondent's case, petitioner moved the court to refuse the declaratory judgment because respondent had failed to prove the actual controversy involved the jurisdictional amount of $3,000.00 (Rec. 73-74). The court reserved ruling on the motion (Rec. 74). At the close of the case the court found:

> "From May 29, 1936, until January 7, 1938, the defendant (petitioner) was totally and presumably permanently disabled by reason of the injury received by him June 29, 1931" (Rec. 102).
> Judgment was rendered accordingly.

8. On appeal, three separate opinions were filed in the court below, the majority holding that the court was not bound by the decisions of the Kansas City Court of Appeals in *Stoner* v. *New York Life Ins. Co.*, 90 S. W. 2d 784, and *Stoner* v. *New York Life Ins. Co.*, 114 F. 2d 167, holding that the evidence was sufficient to warrant the finding of total disability; nor was it bound by like decisions of any of the courts of appeals

of the state; that there was no controlling decisions of the state Supreme Court; that there was no evidence to sustain the finding of the district court; that the policies were plain and unambiguous and not open to construction and that the evidence conclusively showed that petitioner was not totally disabled. The judgment of the district court was reversed, and, without any evidence to prove the jurisdictional amount, that court was ordered to render a declaratory judgment as prayed. Thomas, circuit judge, dissented on the ground the evidence amply sustains the finding of the district court, and that the Missouri law was misinterpreted or ignored in the majority opinion. Van Valkenburgh (circuit judge) filed a separate opinion because "the matter is of such importance not only to the soundness of insurance contracts, but to the integrity of contract construction generally, that I have felt impelled to add my expressed concurrence in Judge Dewey's excellent opinion, and disposition of the cause." He held that the language of the policies was plain and unambiguous and not open to construction (*New York Life Ins. Co.* v. *Stoner*, 109 F. 2d 874).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(a) This case involves the question: What constitutes the "law of the state" within the meaning of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64. Because the interpretation of the Erie case by the court below has resulted in a decision in the eighth circuit in con-

flict with decisions in other circuits on the same matter, an authoritative decision by this court is of pressing importance.

The court below erroneously held that it was bound to look only to the decisions of the Supreme Court of Missouri to ascertain the law of the state; that the Missouri courts of appeals were "intermediate courts" and in determining what is "the law of the state" within the meaning of the Erie case it was not bound to follow the decisions of those courts; and it refused to follow them. The decision misinterprets and is in conflict not only with the Erie case but also with decisions on the same matter by the second, third, seventh and ninth circuits.

Second Circuit:

In re Kountze Bros., City of Los Angeles v. *Irving Trust Co.*, 103 F. 2d 785, l. c. 789.

Third Circuit:

Berlet v. *Lehigh Valley Silk Mills*, 287 Fed. 769.

Taplinger v. *Northwestern Natl. Bank*, 101 F. 2d 274, l. c. 278.

North Philadelphia Trust Co. v. *Smith*, 13 F. 2d 585.

Masino v. *West Jersey & S. R. R. Co.*, 41 F. 2d 645.

Ex parte Zimmerman, 48 F. 2d 76.

Seventh Circuit:

In re Gilligan, Troy Wagon Works Co. v. *Hancock*, 152 Fed. 605.

Ninth Circuit:

Curreri v. *Vice*, 77 F. 2d 130.

John T. Porter Co. v. *Java Cocoanut Oil Co.*, 4 F. 2d 476.

And likewise the decision below is in conflict with the utterances of this court.

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188.

Ruhlin v. *New York Life Ins. Co.*, 304 U. S. 202, l. c. 209.

Blair v. *Com. of Internal Revenue*, 300 U. S. 5-14.

Erie Railroad Co. v. *Hilt*, 247 U. S. 97.

Erie Railroad Co. v. *Duplak*, 286 U. S. 440-444.

Hudson et al., Exrx., v. *Moonier*, 304 U. S. 397.

(b) The court below has erroneously decided an important question of local law not only directly contrary to the decisions of the Kansas City Court of Appeals in actions between the same parties on the same subject and on identical facts, but also contrary to the settled law of the state declared with unanimity by its three courts of appeals (Kansas City, St. Louis and Springfield) in an unbroken line covering more than a third of a century.

Stoner v. *N. Y. Life Ins. Co.*, (Kansas City, 1936) 90 S. W. 2d 784.

Stoner v. *N. Y. Life Ins. Co.*, (Kansas City, 1938) 114 S. W. 2d 167.

Wall v. *Casualty Co.*, (St. Louis, 1905) 111 Mo. App. 504.

James v. *Casualty Co.*, (Kansas City, 1905) 113 Mo. App. 622.

Fogelsong v. *Modern Brotherhood of America*, (Kansas City, 1906) 121 Mo. App. 548.

Katz v. *Union Central Life Ins. Co.*, (Kansas City, 1931) 226 Mo. App. 618.

Rickey v. *N. Y. Life Ins. Co.*, (St. Louis, 1934) 229 Mo. App. 1226.

Kane v. *Metropolitan Life Ins. Co.*, (Springfield, 1934) 228 Mo. App. 649.

Young v. *Metropolitan L. Ins. Co.*, (Springfield, 1935) 84 S. W. 2d 1065.

Moss v. *Metropolitan L. Ins. Co.*, (St. Louis, 1935) 230 Mo. App. 70.

Barton v. *Metropolitan L. Ins. Co.*, (St. Louis, 1937) 103 S. W. (2d) 889.

Pogue v. *Metropolitan L. Ins. Co.*, (St. Louis, 1937) 107 S. W. 2d 144.

Burns v. *Aetna Life Ins. Co.*, (St. Louis, 1939) 123 S. W. 2d 185, l. c. 191.

Heald v. *Aetna Life Ins. Co.*, (Kansas City, 1935) 90 S. W. 2d 797; affirmed 340 Mo. 1143.

(c) The decision of the court below is erroneous in that it ignores and fails to follow the decisions of the Supreme Court of Missouri approving and citing as authority the decisions of the courts of appeals and promulgating the identical rule of law to determine "total disability" announced by those courts.

Heald v. *Aetna Life Ins. Co.*, 340 Mo. 1143, affirming Kansas City Court of Appeals in *Heald* v. *Aetna Life Ins. Co.*, 90 S. W. 2d 979.

State ex rel. v. *Hostetter*, 338 Mo. 589, reviewing on certiorari decision St. Louis Court of Appeals in *Moss* v. *Metropolitan Life Ins. Co.*, 230 Mo. App. 70.

State ex rel. v. *Allen*, 337 Mo. 525, reviewing on certiorari decision of Springfield Court of Appeals in *Kane* v. *Metropolitan Life Ins. Co.*, 228 Mo. App. 649.

(d) In ruling that the policies are plain and unambiguous and not open to interpretation, the decision

of the court below is erroneous and in conflict with the decisions of the Supreme Court of Missouri as well as the decisions of all of its courts of appeals. It failed to follow:

State ex rel. New York Life Ins. Co. v. *Shain* (see Appendixes A and B).

State ex rel. Metropolitan Life Ins. Co. v. *Allen*, 337 Mo. 525, 85 S. W. 2d 469.

State ex rel. Metropolitan Life Ins. Co. v. *Hostetter*, 338 Mo. 589, 92 S. W. 2d 122.

Bellows v. *Travelers Ins. Co.*, 203 S. W. 978.

(e) The majority opinion as to the facts is opposed to the undisputed facts in the record and its conclusion upon the facts stated is erroneous and contrary to the decisions of the Missouri cases.

(f) Without any evidence to show that the amount in controversy exceeded the jurisdictional amount which was put in issue by the answer the court below erroneously directed the district court to enter a declaratory judgment as prayed in favor of respondent. In so doing the court below disregarded the decisions of this court in *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178; *Kvos* v. *Associated Press*, 299 U. S. 269.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Circuit Court of Appeals for the Eighth Circuit be reversed by this Honorable Court, and your petitioner have such

other and further relief in the premises as to this Honorable Court may seem meet and just.

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

I hereby certify that the foregoing petition, in my opinion, is well founded and entitled to the favorable consideration of the court, and that it is not filed for the purpose of delay.

KENDALL B. RANDOLPH,
Counsel for Petitioner.

BRIEF AND ARGUMENT.

ERRORS RELIED UPON.

The court below erred:

I.

In refusing to follow the state law as declared both by the Supreme Court and courts of appeal of Missouri, as well as the utterances of this court and the circuit courts of appeal.

II.

In deciding an important question of local law contrary to the decisions of the Supreme Court and courts of appeals of Missouri.

III.

In holding the policies unambiguous contrary to the decisions of the state courts.

IV.

In misstating the facts and misinterpreting the law of Missouri.

V.

In directing judgment in favor of respondent without any evidence as to the jurisdictional amount.

I.

It is admitted that all of the policies were applied for and delivered and the premiums paid in Missouri (Rec. 25). The interpretation of the policies and the rights of the parties thereunder therefore are governed by the law of that state.

Mutual Life Ins. Co. v. *Johnson*, 293 U. S. 335, 79 L. Ed. 398.

Northwestern Mutual Life Ins. Co. v. *McCue*, 223 U. S. 234, 56 L. Ed. 419.

Cravens v. *New York Life Ins. Co.*, 148 Mo. 583, (Aff.) 178 U. S. 583.

Myers v. *Ocean Acc. Corp.*, 99 F. 2d 485, l. c. 488.

New York Life Ins. Co. v. *Levin*, 102 F. 2d 403, 405.

And whether the evidence is sufficient to make a case must be determined by the laws of Missouri.

Shaw v. *U. S. Fidelity & G. Co.*, 101 F. 2d 92, l. c. 96.

II.

This action seeks only the determination of a legal right, *i. e.*, whether the respondent is indebted to petitioner in the sum of $3,165.70. It, therefore, is an action at law and the court below was bound by the finding of total disability made by the trial court if there is any substantial evidence to support it. In such

circumstances it is not the province of the court below to make its own finding.

State Farm Mutual Auto Ins. Co. v. *Coghran*, 303 U. S. 485, 82 L. Ed. 970.

III.

The decision of the Kansas City Court of Appeals in Stoner v. New York Life Insurance Company, 90 S. W. 2d 784, and in Stoner v. New York Life Insurance Company, 114 S. W. 2d 167, interpreting the policies and holding the evidence is sufficient to sustain a finding of total disability is the law of Missouri controlling on the federal courts; and the decision of the court below to the contrary is erroneous and in conflict with the utterances of this court and the decisions of the Second, Third, Seventh and Ninth Circuit Courts of Appeals.

The decision of the majority of the court below that there was no substantial evidence to support the finding of total disability made by the trial court and that the evidence conclusively shows petitioner was not totally disabled is directly contrary to the decision of the Kansas City Court of Appeals in *Stoner* v. *New York Life Insurance Company*, 90 S. W. 2d 784, and *Stoner* v. *New York Life Insurance Company*, 114 S. W. 2d 167, which the court below erroneously decided was not binding upon it and which it expressly refused to follow.

The decisions of the Kansas City Court of Appeals in the Stoner cases interpret the identical policies. The evidence in those cases and in the case at bar is identical, as a comparison of the evidence in the records with the facts stated in the Buchanan County case will show.

In fact the evidence in the instant case was read from the transcript of the record in those cases. If those decisions are "the law of the state" within the meaning of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, then the court below erred in refusing to follow them.

The majority of the court below erroneously ruled that "the law of the state" within the meaning of the Erie case is the law declared by the Supreme Court of Missouri only; that it was not bound by the decisions of the Missouri courts of appeals which were termed "intermediate appellate courts"; and that as the state Supreme Court had not construed the terms contained in the policies here involved, the court below could, and it did, refuse to follow the decisions of the state courts of appeals. In a word: The ruling is that in the absence of a controlling decision of the state Supreme Court, there is no "law of the state" within the meaning of the Erie case. And this, though the decisions in the *Stoner Cases, supra*, as will presently appear, declare the same rule of law announced with one accord in an unbroken line of cases by all the courts of appeals in Missouri for more than one-third of a century, and they have been approved and followed by the state Supreme Court.

IV.

In the absence of a contrary controlling decision of the state Supreme Court, the courts of appeals in Missouri declare the law of the state.

(a) The Missouri courts of appeals are not "intermediate appellate courts." Their decision is final. From

them there is no appeal. Even though the decision of one court of appeals is in conflict with that of another, the Supreme Court has no jurisdiction to determine that conflict unless the case last decided is certified by the court of appeals itself to the Supreme Court for a determination of the conflict. The Supreme Court cannot compel certification. The Kansas City and St. Louis Courts of Appeals were created by the state constitution and the Springfield Court of Appeals by constitutional authority. *They are courts of last resort as to all cases within their jurisdiction,* which extends, in civil cases, to controversies where the amount in dispute does not exceed $7,500.00 (R. S. Mo., 1929, Sec. 1914). They may not render a decision in conflict with a prior decision of the Supreme Court; but it is only when they exceed their jurisdiction in that respect that their decision may be controlled by the Supreme Court on certiorari. The conflict between decisions of courts of appeals cannot be determined even on certiorari (*State ex rel. Packing Co.* v. *Reynolds*, 287 Mo. 697, l. c. 710). If there be no prior contrary decisions of the Supreme Court, the decisions of any of the three courts of appeals, right or wrong, are conclusive even upon the Supreme Court on certiorari and upon all *nisi prius* courts. In such circumstances they are the highest courts of the state.

State ex rel. Winters v. *Trimble*, 315 Mo. 1295, l. c. 1301.

State ex rel. Security Insurance Co. v. *Trimble*, 318 Mo. 173, l. c. 178.

Fairchild v. *Lohman*, 13 F. 2d 252, l. c. 254.

In *State ex rel. Security Insurance Company* v. *Trimble, supra,* the Supreme Court said:

> "The Kansas City Court of Appeals, with respect to controversies over which it has jurisdiction, is a court of last resort, with power to finally determine a case whether its judgment be right or wrong, except only to certification, or the issuance of a writ of certiorari when its judgment is deemed in conflict with the last previous rulings of this court on the subject."

In *State ex rel. Winters* v. *Trimble, supra,* the Supreme Court said:

> "It may be said in passing that the court of appeals, under the constitution of this state, when acting within the sphere of its jurisdiction, is a court of final resort and its judgments are conclusive on this court, when reviewed by certiorari, except in those cases where it appears that the rulings of said court are in conflict with some prior and controlling decision of this court on the same or similar facts. In *State ex rel.* v. *Allen,* 256 S. W. 1. c. 1052, in speaking of the court of appeals, we said: 'As long as said court promulgated no rule of law which could be said to conflict with a former ruling of this court on the same or similar facts, it had the inherent right to determine the issues involved, whether its ruling be right or wrong."

In *Fairchild* v. *Lohman, supra,* Judge Reeves, D. J., said:

> "Counsel for the ancillary administrator admits that the rule, as above announced, prevails in the courts of appeals in Missouri, but says that the federal court should not follow such ruling, because said courts are not the highest court of the state.

> The federal rule cannot be so interpreted. The obligation to follow the state rule arises if 'the court to be followed is the court of *last resort* in the state' * * * the courts of appeals in Missouri are not intermediate tribunals, but are courts of last resort. Supervisory control over said courts by the Supreme Court is limited to those cases where there may be a refusal to follow the later decisions of the supreme tribunal."

(b) Even before the Erie case, the federal courts did not hold they were uncontrolled by the decisions of state appellate courts on matters of general law because those decisions did *not* declare the law of the state in the absence of a controlling decision of a higher court, but because, though they *did* declare the law of the state, the federal courts were not bound by the state law, and were free to apply the "federal general common law" as they conceived it. And where the statutory law of the state (by which the federal courts were bound) was to be applied, those courts recognized as the law of the state the construction put upon the statute by uniform decisions of intermediate appellate courts in the absence of a contrary controlling ruling by a higher state court.

In *Erie Railroad Co.* v. *Hilt*, 247 U. S. 97 (decided in 1918), the Supreme Court of Pennsylvania, not the highest court of that state, had construed the applicable Pennsylvania statute in *Barcolini* v. *Atlantic City S. R. Co.*, 82 N. J. L. 107. The Third Circuit Court of Appeals refused to follow that case because it was not a decision of the highest court of Pennsylvania (*Erie R. Co.*

v. *Hilt*, 246 Fed. 800). This court reversed the court below, saying:

> "The words of the statute seem to us to require a different construction from that adopted and they have been given their full literal meaning by the Supreme Court of the state in the case of the infant younger than the plaintiff. *Barcolini* v. *Atlantic City & S. R. Co.*, 82 N. J. L. 107. In view of the importance of that tribunal in New Jersey, although not the highest court in the state, we see no reason why it should not be followed by the courts of the United States, even if we thought its decision more doubtful than we do."

In 1923, the Third Circuit Court of Appeals in *Berlet* v. *Lehigh Valley Silk Mills*, 287 Fed. 769, said:

> "Jurisdiction in this case is based solely on the ground of diversity of citizenship. We are therefore administering Pennsylvania law, and not federal law. The general rule of law is that, when no federal question is involved, and when the law, common or statutory, involved is not general, and has become established as a part of the law of the state, a federal court will follow the decisions of the state court of last resort. *Snare & Triest Co.* v. *Friedman*, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367 (certiorari denied 214 U. S. 518, 29 S. Ct. 700, 53 L. Ed. 1065); *Public Service Co.* v. *Wurtsthorn et al.*, (C. C. A.) 278 Fed. 408. While the Superior Court of Pennsylvania is not the court of last resort in that commonwealth, it is a tribunal of such importance that this court will follow its decision construing this statute. *Erie Railroad Co.* v. *Hilt*, 247 U. S. 97, 100, 38 S. Ct. 435, 63 L. Ed. 1003."

In 1906, the Seventh Circuit Court of Appeals, in *In re Gilligan, Troy Wagon Works Co.*, v. *Hancock*, 152 Fed. 605, said:

> "Under the statute creating the Indiana Appellate Court (Section 10, Indiana Acts, 1901, page 567, Chapter 247), it is provided that the jurisdiction of the appellate court shall be final, except in the event that the case is transferred to the Supreme Court; or in case that the Supreme Court, upon application, shall order the case certified to it; or in cases involving a sum exceeding six thousand dollars.
>
> "*West* v. *Fulling* was the interpretation, by the appellate court, of the law of Indiana. It purported to declare the law in the light of the previous declarations of the Supreme Court, as far as those decisions went. Unquestionably, it was an interpretation, the appellate court decision being in fact final, that the *nisi prius* courts of Indiana would feel bound to follow; for whatever may be the limitation on the rights of the appellate court, contrary to the judgment of the Supreme Court, to change the interpretation of Indiana law, the decision in *West* v. *Fulling* cannot be said to be plainly contrary to the decisions of the Supreme Court. The most that could be said would be that the appellate court, seeking to follow the decisions of the Supreme Court, had possibly misinterpreted them—an assumption that would not relieve the *nisi prius* courts of Indiana, or the United States District Court sitting for that district, from the duty of following the decision. Upon the authority of *West* v. *Fulling*, therefore, unmolested by the Supreme Court of Indiana, we feel ourselves bound to affirm the order appealed from."

In 1926, the Third Circuit Court of Appeals in *North Philadelphia Trust Co.* v. *Smith*, 13 F. 2d 585, after

citing a number of decisions of the Supreme Court of New Jersey (not the highest court of the state) said:

> "Beginning long ago with *Cumberland Bank* v. *Hall*, 6 N. J. Law 215, passing through *Den* v. *Wright*, 7 N. J. Law 175, and *Hunt* v. *Gray*, 35 N. J. Law 227, and running to *Hoey* v. *Jarman*, 39 N. J. Law 523, and *Johns* v. *Crawley*, 57 N. J. Law 222, New Jersey courts have uniformly declared that whether an alteration in a promissory note or other instrument was made after or before execution is a question for the jury. The subject was discussed at length by Chief Justice Beasley in *Hunt* v. *Gray*, *supra*. * * * This was a decision by the Supreme Court of New Jersey, not by the court of errors and appeals. That court, however, though not the highest court of the state, is in the estimation of the Supreme Court of the United States, as shown in *Erie R. R. Co.* v. *Hilt*, 247 U. S. 97, 100, of such standing as to compel the courts of the United States to follow its pronouncements."

In 1925, the Third Circuit Court of Appeals in *Toplinger* v. *Northwestern Nat. Bank*, 101 F. 2d 275, held that it was bound by the decision of the Superior Court of Pennsylvania in *Kaufman & Baer* v. *Monroe Motor Line Co.*, 124 Pa. Super. 27, which was not the highest court in the state. The court said:

> "However, since it (the question) was squarely raised by the facts of the Kaufmann & Baer case, the decision in that case amounts to a construction of the statute by a Pennsylvania appellate court of high authority which we must accept as binding upon us, even though if the matter were open for our consideration a different conclusion might well be reached."

In *Masino* v. *West Jersey & S. S. R. Co.*, 41 F. 2d 645, Third Circuit, the court said:

> "We quote all the pertinent part of this short opinion because, in so far as we have been informed, it is the first case on the statute in New Jersey, and for the reason that in succeeding cases, decided by the Supreme Court of that state, which, though an intermediate appellate tribunal, is of sufficient importance to compel observations of its decisions, *Erie R. R. Co.* v. *Hilt*, 247 U. S. 97, the principal seems not to have been closely followed."

The court of appeals decided the case upon the rulings of the Supreme Court of New Jersey.

In *Ex parte Zwillman*, 48 F. 2d 76, Third Circuit, the court said:

> "In the case of *Erie R. R. Co.* v. *Hilt*, 247 U. S. 97, where a construction was placed by this court upon a statute of New Jersey in the absence of its construction by the court of errors and appeals, the highest court of the state, Mr. Justice Holmes, in an opinion reversing the judgment of this court (246 Fed. 800), said: 'The words of the statute seem to us to require a different construction from that adopted, and they have been given their full literal meaning by the Supreme Court of the state in the case of an infant younger than the plaintiff. *Barcolini* v. *Atlantic City & Shore R. R. Co.*, 82 N. J. Law 107. In view of the importance of that tribunal in New Jersey, although not the highest court in the state, we see no reason why it should not be followed by the courts of the United States, even if we thought its decision more doubtful than we do.'"

In the Ninth Circuit, *Curreri* v. *Vice*, 77 F. 2d 130, the court said:

"The question of whether or not we are bound to follow the decision of an intermediate appellate court such as the District Court of Appeal of California, interpreting the statutory law of the state, is a matter upon which there has been some difference of opinion. See opinion by Circuit Judge Hand, *Irving Nat. Bank* v. *Law*, 9 F. 2d 536; *In re Gilligan*, 152 Fed. 605; *John T. Porter Co.* v. *Java Cocoanut Oil Co.*, 4 F. 2d 476, by this court. The Supreme Court, in *Erie R. Co.* v. *Hilt*, 247 U. S. 97, 38 S. Ct. 435, 436, 62 L. Ed. 1003, said: 'In view of the importance of that tribunal (Supreme Court) in New Jersey, although not the highest court in the state, we see no reason why it should not be followed by the courts of the United States, even if we thought its decision more doubtful than we do.'

"Upon this ground the Supreme Court reversed a decision of the Circuit Court of Appeals of the Third Circuit (246 Fed. 800) which, in dealing with a case arising in New Jersey, had declined to follow the decisions of the Supreme Court of New Jersey. See, also, *Ex parte Zwillman*, (C. C. A.) 48 F. 2d 76, 78. It is unnecessary for us to determine whether or not we are bound to follow the decision of the California District Court of Appeal *In re Schwitalla, supra*, for we think the decision is right."

(c) If, before the Erie case, the decisions of the state appellate courts were binding upon the federal court as declaring the law of the state in the construction of its statute law, certainly such decisions, since the Erie case, declare the general law of the state in the absence of a contrary decision by a higher court. If there be no decision of a higher court, where must the federal court look for the law of the state? The Erie case says the law of the state is the law declared by "the state courts." What state courts?

This court in *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, l. c. 209, said:

> "The application of the 'state law' to the present case, or any other controversy controlled by *Erie R. Co.* v. *Tompkins*, does not present the disputants with duties difficult or strange. The parties and the federal courts must now search for and apply the entire body or substantive law governing an identical action in the state courts. Heretofore, even in what were termed matters of 'general' law, counsel had to investigate the enactments of the state legislature. Now they must merely broaden their inquiry to include the decisions of the state courts, just as they would in a case tried in the state courts, and just as they have always done in actions brought in the federal courts involving what were known as matter of 'local' law."

And, in *Hudson* v. *Moonier*, 304 U. S. 397, this court said:

> "A federal court, in determining the liability of the driver and lessor of a truck not equipped with a horn or other signaling device, to one struck by it, *should apply the law which would have been applied had the action been brought in a state court*" (italics ours).

In the second circuit, *In re Kountze Bros., City of Los Angeles* v. *Irving Trust Co.*, 103 Fed. 785 (decided after the Erie case), the court held that the New York law applied and said it "considered controlling" among others the decision of the appellate division in *Staten Island Cricket & Baseball Club* v. *Farmers Loan & Trust Co.*, 58 N. Y. S. 460.

If this case were tried in the Missouri state court, what law would be applied? In the absence of a con-

trary decision by its Supreme Court, it would be the law as declared by its courts of appeals. In this particular case the decisions in the Stoner cases would govern not only because they declare the law of Missouri but because on an identical record in actions between the same parties, the identical question has been decided *stare decisis.*

State v. *Fidelity & Deposit Co.*, 99 S. W. 2d 476, l. c. 478.

Moreover, for 35 years, in some cases where the policies were identical, and in other cases where the policies are substantially the same, all of the Missouri Courts of Appeals, St. Louis, Kansas City and Springfield, have announced the same rule of law. It is no longer an open question in Missouri.

In *Burns* v. *Aetna Life Ins. Co.*, 123 S. W. 2d 185, where the policy provided for disability payments if the insured were "unable to engage in any occupation or employment for wage or profit" and where it was claimed a demurrer to the evidence should have been given because it was shown plaintiff did perform some of his duties, the court said:

> "As to the law of Missouri, it is well settled in this state that it is sufficient to make a question to be submitted to the triers of the fact if it be shown that the insured is suffering from an infirmity or a disease which renders him unable to perform in the usual and customary way all of the material acts of any occupation, business or profession that he would be able to engage in except for his disabling infirmity or disease."

In support of the ruling the court cites cases decided by the state Supreme Court as well as the courts of appeals.

In *Pogue* v. *Metropolitan Life Ins. Co.*, 107 S. W. 2d 145, where the provisions of the policy involved are *identical* with those in the case at bar, and the facts very similar, the court laid down the same rule of law and reached the same conclusion as the court did in the two Stoner cases and held the question of total liability was one of fact to be determined by the triers of the fact and said:

> "*It is no longer a debatable question in this state* that the provisions of a policy insuring against total and permanent disability such as those involved in this case are to be given a liberal one and not a literal one. * * * It is sufficient to make it a question to be submitted to the triers of the fact if it be shown that the insured is suffering from an infirmity or a disease which renders him unable to perform in the usual and customary way substantially all of the material acts of any occupation, business or profession, that he would be able to engage in, except for his disabling infirmity or disease" (italics ours).

The two cases recognized by the Supreme Court as leading cases in Missouri are *Fogelsong* v. *Modern Brotherhood of America*, 121 Mo. App. 548, and *James* v. *Casualty Company*, 113 Mo. App. 622. The facts in those two cases are remarkably like the facts in the case at bar. Those cases have been expressly approved

and followed by the Supreme Court *as the leading cases in this state.*

Bellows v. *Travelers Ins. Co.*, 203 S. W. 978.
Heald v. *Ins. Co.*, 340 Mo. 1143, l. c. 1150.

Judge Dewey, in the court below, attempted to distinguish the Heald case, saying the policy there was an occupational policy. It is difficult to conceive how the same words could mean one thing when used in an occupational policy and have a different meaning when used in a policy not occupational. It is certain that the Supreme Court of Missouri recognized no distinction because in reaching its conclusion that court cited and followed the decisions of the courts of appeals where the policies are not occupational.

The court below therefore erred in refusing to follow the Stoner cases and the long line of harmonious decisions of the three courts of appeals declaring the settled law of the state which have been approved and followed by the state Supreme Court.

Stoner v. *N. Y. Life Ins. Co.*, (Kansas City, 1936) 90 S. W. 2d 784.
Stoner v. *N. Y. Life Ins. Co.*, (Kansas City, 1938) 114 S. W. 2d 167.
Wall v. *Casualty Co.*, (St. Louis, 1905) 111 Mo. App. 504.
James v. *Casualty Co.*, (Kansas City, 1905) 113 Mo. App. 622.
Fogelsong v. *Modern Brotherhood of America*, (Kansas City, 1906) 121 Mo. App. 548.
Katz v. *Union Central Life Ins. Co.*, (Kansas City, 1931) 226 Mo. App. 618.

Rickey v. *N. Y. Life Ins. Co.*, (St. Louis, 1934) 229 Mo. App. 1226.

Kane v. *Metropolitan Life Ins. Co.*, (Springfield, 1934) 228 Mo. App. 649.

Young v. *Metropolitan L. Ins. Co.*, (Springfield, 1935) 84 S. W. 2d 1065.

Moss v. *Metropolitan L. Ins. Co.*, (St. Louis, 1935) 230 Mo. App. 70.

Barton v. *Metropolitan L. Ins. Co.*, (St. Louis, 1937) 103 S. W. 2d 889.

Pogue v. *Metropolitan L. Ins. Co.*, (St. Louis, 1937) 107 S. W. 2d 144.

Burns v. *Aetna Life Ins. Co.*, (St. Louis, 1939) 123 S. W. 2d 185, l. c. 191.

Heald v. *Aetna Life Ins. Co.*, 340 Mo. 1143, affirming Kansas City Court of Appeals in *Heald* v. *Aetna Life Ins. Co.*, 90 S. W. 2d 797.

State ex rel. v. *Hostetter*, 338 Mo. 589, reviewing on certiorari decision St. Louis Court of Appeals in *Moss* v. *Metropolitan Life Ins. Co.*, 230 Mo. App. 70.

State ex rel. v. *Allen*, 337 Mo. 525, reviewing on certiorari decision of Springfield Court of Appeals in *Kane* v. *Metropolitan Life Ins. Co.*, 228 Mo. App. 649.

V.

In ruling that the policies are plain and unambiguous and not open to interpretation, the decision of the court below is erroneous and in conflict with the decisions of the Supreme Court of Missouri as well as the decisions of all of its courts of appeals.

State ex rel. New York Life Ins. Co. v. *Shain*, (see Appendixes A and B).

State ex rel. Metropolitan Life Ins. Co. v. *Allen*, 337 Mo. 525, 85 S. W. 2d 469.

State ex rel. Metropolitan Life Ins. Co. v. *Hostetter*, 338 Mo. 589, 92 S. W. 2d 122.
Bellows v. *Travelers Ins. Co.*, 203 S. W. 978.

The Kansas City Court of Appeals in *Stoner* v. *New York Life Ins. Co.*, 90 S. W. 2d 784, ruled that the policies were open to construction. Thereupon respondent applied to the Supreme Court of Missouri for a writ of certiorari to quash the opinion on the ground the decision that the policies were open to construction was contrary to the decisions of the Supreme Court holding that where the language is unambiguous it must be given its plain meaning and is not open to construction (see Appendix A). The court denied the writ (see Appendix B). Certiorari is a writ of right where the decision of a court of appeals is in conflict with a previous decision of the Supreme Court. The denial of the writ could have been upon no other ground than that the Supreme Court were of opinion that the policies were ambiguous and open to construction; otherwise the decision of the court of appeals construing them would have been clearly in conflict with the previous decisions of the Supreme Court holding that unambiguous contracts were not open to construction, and the writ would have been granted. So that it appears that the Supreme Court has decided that the policies in this case are ambiguous and the court below erred in not following the state law.

In *State ex rel. Metropolitan Life Ins. Co.* v. *Allen*, 337 Mo. 525, 85 S. W. 2d 469, the relator sought on

certiorari to quash the opinion of the Kansas City Court of Appeals in *Kane* v. *Metropolitan Life Ins. Co.*, 73 S. W. 2d 826, on the ground that court had construed the policies which relator claimed were plain and unambiguous and not open to construction, and therefore the decision of the court of appeals was contrary to the prior decisions of the Supreme Court. The sole question, therefore, was whether or not the policy was ambiguous. Its provisions were even more favorable to the insurance company than the provisions in the policies in the instant case. It provided for disability benefits if by reason of accident or disease the insured was "*wholly prevented thereby from performing any work for compensation or profit.*" The Supreme Court ruled the provision was ambiguous, saying:

> "Relator claims that the disability provisions of the certificate are plain, unambiguous, and not open to construction. Based on this claim, the contention is that the construction given such provisions by the court of appeals conflicts with previous decisions of this court which hold that plain and unambiguous language in an insurance policy is not open to construction but such language must be given its plain meaning. Without setting out the cases which relator cites in support of this contention, it may be stated that the uniform holding of this court is that where an insurance policy is open to different constructions, that most favorable to the assured must be adopted. But where the language of the policy is plain and unambiguous, such language must be given its plain meaning. So the question is: Are the provisions of the certificate plain and unambiguous? * * * The language of the policy is that a policyholder is totally and per-

manently disabled when he is permanently, continuously and wholly prevented from performing any work for compensation or profit. Evidently the purpose of one in carrying a policy of insurance providing for total and permanent disability benefits is to have such benefits take the place of his earnings and provide a livelihood for him in case he becomes totally and permanently disabled. * * * If an able-bodied railroad engineer carrying such a policy should lose both legs and one arm and yet be able to sit on the street corner and sell peanuts, shoestrings, or newspapers, for which he would receive some compensation or profit, would he be totally disabled within the meaning of his policy? If the hearing and eyesight of a member of this court should become so defective that he would be unable to perform his judicial duties, but he would yet be able to mow his lawn or hoe his garden, and do like work for his neighbors for a small compensation, would he be totally disabled within the meaning of the policy in question? Does the language of the policy mean that if the insured is able to perform substantially the duties of his occupation he is not disabled? Or does it mean that if he is physically able to perform substantially any work for which he is equipped, he is not disabled? Such an insurance policy is nothing more or less than a contract between the insurance company and the insured. When we keep in mind the evident purpose prompting the parties to enter into such a contract, we know it does not mean that if an injured policyholder is able to do anything whatsoever for any compensation whatsoever, he is not totally disabled. But what does it mean? What does performing work for compensation or profit mean? The language of the policy is not clear and plain. Its meaning cannot be determined except by an authoritative construction. * * * In view of the fact that this court has not construed an insurance policy like or similar to the one here in

controversy, and in view of the further fact that the language of the policy in question is ambiguous, and therefore open to construction, the construction the court of appeals gave the policy is not subject to review by this court on certiorari."

In *State ex rel. Metropolitan Life Insurance Company* v. *Hostetter*, 338 Mo. 589, 92 S. W. 2d 122, the Supreme Court on certiorari reviewed the judgment of the St. Louis Court of Appeals in *Moss* v. *Metropolitan Life Ins. Co.*, 84 S. W. 2d 395. There the policies provided for disability payments if the insured had "become totally and permanently disabled, as the result of bodily injury or disease so as to be prevented thereby from engaging in any occupation and performing any work for compensation or profit." The court of appeals held the policy was open to construction and construed it exactly as the Kansas City Court of Appeals construed the policies in the instant case. The sole question was whether the policy was ambiguous. Following the *Allen Case, supra*, the Supreme Court held that it was and quashed its writ of certiorari theretofore issued.

In *Bellows* v. *Travelers Ins. Co.*, 203 S. W. 978, the Supreme Court of Missouri had under consideration a policy providing for disability benefits if the insured became "wholly disabled by injuries * * * from performing any and every kind of duty pertaining to his occupation." The Supreme Court ruled that it was open to construction and held the contract to mean "not that the assured was rendered absolutely and literally unable to perform any part of his occupation, but that

he was disabled from performing substantially the occupation stated in the policy."

It is to be noted that the Supreme Court in that case cited and followed *James* v. *Casualty Co.*, 113 Mo. App. 622 (repudiated by the court below), as "a leading and excellently considered case on this subject" and also followed *Wall* v. *Casualty Company*, 111 Mo. App. 504; *Fogelsong* v. *Modern Brotherhood of America*, 121 Mo. App. 548, which are also repudiated by the court below.

In holding the policies in the instant case were not ambiguous the court below failed to follow the decisions of the Supreme Court of Missouri as well as the courts of appeals as it was required to do by the Erie case.

VI.

In its findings of facts the court below completely disregarded the undisputed evidence and misconstrued the Missouri cases.

Petitioner was and had been all his life a farmer (Rec. 26). The policies stated his occupation to be a farmer and that he contemplated no change (Rec. 24). Respondent proved petitioner had only a common grammar school education and that he had no experience or training in any other business, profession, occupation or avocation and was not equipped to do any work except that of a farmer (Rec. 26). By its own evidence respondent eliminated the ability of petitioner to engage in any work, business or profession other than that of a farmer. It made no effort to prove he could

or ever did engage in any other work. It confined its efforts to proving he was not totally disabled to perform the substantial duties of a farmer and upon that issue alone this case was tried in the district court and decided in the court below.

Judge Dewey in his opinion said:

> "It is true that in transacting some of the details of the business in which the insured has been engaged he is discommoded and slowed up by his injury, but this condition does not prevent him and he is able and does without any excess pain, perform all of the material and substantial duties to carry on the business in which he is now engaged."

And Judge Van Valkenburgh said:

> "It is true that 'the appellant having the burden of proof tried this case on the theory that the insured is engaged in the occupation and business of operating a grain and stock farm'; and so he is. * * * Complainant introduced evidence that established beyond dispute and was undisputed, that appellee was, during the period in question, following an occupation and engaged in a business for remuneration and profit; therefore, within the terms of the disability clause. He was conducting these operations substantially as he did before he was injured, with less physical participation on his part, and with less men employed, and, as he expresses it, with more modern machinery. He does all the substantial and material acts essential on his part to the operation in which he is engaged."

There is no evidence that warrants either statement and the evidence introduced refutes it. Petitioner was engaged in one occupation that required both phy-

sical labor and mental work. It was not only proved but admitted he could do no physical work on a farm (Rec. 88). Mentally he was not affected and he could and did hire others and direct them what to do, though he could not oversee their work. In doing the physical work and directing employees he was not engaged in two occupations; he was performing the correlative duties of one—that of a farmer.

> "He was a farmer in the sense the term is usually understood to express, that is, one who directs the business on a farm and works at farm labor."
>
> *Fogelsong* v. *Modern Brotherhood of America*, 121 Mo. App. 548.
>
> *Heald* v. *Aetna Life Ins. Co.*, 340 Mo. 1103.

Stoner vs. N.Y.Life Ins.Co.,90 S.W.(2)l.c.796-797

His one business was that of cultivating and operating a grain and stock farm. In carrying on that business both physical and mental effort was required. The facts are, as stated in the Stoner cases, in substance, this:

As the result of his injury the bones of his left foot were jerked out of the ankle joint and it became ankylosed and infected. He was in the hospital two months, at home in bed three months, then in a wheel chair for a month. Then he was able to walk on two crutches, then on a crutch and a cane and finally with the aid of a cane. He cannot walk without it, the ankle is stiff and the muscles of the lower leg do not function. He cannot move his toes. He can walk a block or two and if he does or drives a car his leg

swells and hurts him. The injured foot is cold, the ankle joint is three-quarters of an inch larger than the other, his left foot drags and is pointed out. He walks very slowly, with a decided limp (Rec. 26-27). In operating one farm owned and another rented by him, he was required to and he did do the chores, milk, get the teams ready, plow, cut stalks, plant corn, alfalfa, oats and wheat, mow hay, cultivate the ground, harvest the crops, buy and feed livestock, haul them to market and do all of the physical work done on the farm (Rec. 28). And he directed his employees as to the work they were to do, showed them how to do it and inspected it after it was done (Rec. 28-29). Since his injury he has not been able to do any physical work. There is nothing the matter with him mentally, and he is able to employ others to do the work and direct them what to do, but is unable to supervise the work (Rec. 28-29).

Upon this evidence, the majority of the court say that he is substantially performing all of the material duties of his occupation with a little inconvenience to himself. That is saying, as a matter of law, only in other words, that the physical work performed by a farmer is not one of the substantial duties of his occupation. It is not sufficient to show, as the majority of the court below held, that petitioner could do the mental work of an occupation which required both physical and mental effort. It was necessary to prove that the petitioner, in operating the farms, could perform all the substantial duties of that one occupation in the usual and customary manner he did before he was in-

jured. All of the Missouri cases decided both by its Supreme Court and its courts of appeals say that is the law.

In *Equitable Life Assurance Society* v. *Bomar*, 106 F. 2d 640, the Sixth Circuit Court of Appeals, applying the Kentucky law, which is identical with that of Missouri, said:

> "In his application for the policy issued in 1924, the insured gave his occupation and business as a 'hardware dealer.' He stated that he had no other occupation and contemplated no change. The disability clause must be construed in the light of these statements. *Prudential Ins. Co.* v. *Harris*, 254 Ky. 23, 70 S. W. 2d 949, 953; *John Hancock Mut. Life Ins. Co.* v. *Cave*, 240 Ky. 56, 58, 40 S. W. 2d 1004, 79 A. L. R. 848. Appellant knew that it was insuring Bomar against total disability to transact a business requiring not only physical effort but judgment and discretion.
>
> "If the insured was unable either physically or mentally to discharge the important and material duties necessary to the prosecution of his business in substantially his usual and customary manner, he was totally disabled. Such are the holdings generally and the Court of Appeals of Kentucky is in accord."

In order not to prolong this brief, but for the convenience of the court, we quote only from *Fogelsong* v. *Modern Brotherhood of America*, 121 Mo. App. 548, one of the cases which the Missouri Supreme Court has said is a leading case in Missouri.

> "The plaintiff's vocation was that of a farmer, having lived on a farm all of his life. He was at

the time of the trial fifty-seven years of age, and seriously afflicted in his right leg and had been so afflicted for more than three years. The evidence tended to show that the diseased condition of this leg was permanent and that it would be necessary to amputate it. It appears that in September, 1902, the disease began to make its appearance in plaintiff's right leg. From the beginning of the following December he was confined to his bed for a period of three months. After that, the condition of his leg improved so that he could walk upon crutches, and afterwards for a while he walked with the aid of a cane. After July, 1903, he dispensed with medical treatment and applied leaf tobacco to his diseased leg. It was shown that *he directed the work to be done on his farm, and that he performed some labor himself.* He drove the wagon while loading and unloading corn and in hauling coal from the mine. He aided to some extent in cultivating a crop of two thousand bushels of pickles. He plowed some and helped in the cutting and shocking of oats. Notwithstanding plaintiff performed certain farm labor, there was evidence tending to show that he was disabled from performing substantially the occupation of a farmer.

"The defendant contends that, *as the plaintiff was not disabled from directing his sons in carrying on the business of the farm*, and did some of the work himself, his disability was not total. It is also contended that, if he was able to carry on any vocation in life, he had not suffered such total disability as the terms of the policy required in order for him to be entitled to the indemnity claimed. The plaintiff's insurance was not against his disability as a farmer, but such a total disability as would render him unable to carry on or conduct any vocation or calling. It is the defendant's theory that though plaintiff may not be considered a farmer in the strictest sense, that is, capable of doing farm work, yet, if he was capable of conducting farm

work *by direction*, he was not entitled to recover under the terms of his policy. Bacon on Ben. So. & Life Ins., Sec. 595 a, supports that theory. * * *

"But we are unwilling to adopt such a doctrine, the effect of which would be practically to reduce all such contracts to nullities and to make them the instruments of extracting dues from policyholders without creating any liability on the part of the insurers. Common knowledge of the occupations in the lives of men and women teach us that there is scarcely any kind of disability that prevents them from following some vocation or other, except in cases of complete mental inertia. We have examples of persons without hearing and without sight following a vocation—some without feet and some without hands, engaged in business. The achievements of disabled persons are seemingly marvelous. Under defendant's theory, the plaintiff might embark in the peanut trade or follow the business of selling shoestrings or lead pencils or follow some similar calling, in which instances, under the rule invoked, there would be no disability within the meaning of the policy. In our opinion such was not within the contemplation of the parties. In order to carry out the intent of the parties, it is our duty to disregard the broad language used which would have the effect to defeat the purpose of the contract and render it a nullity. * * *

"But it is contended that plaintiff did not show that plaintiff's disability totally prevented him from carrying on the business of a farmer. Notwithstanding an individual in some instances may be a farmer without performing manual labor, the plaintiff was not a farmer in that sense. He was a farmer in the sense the term is usually understood to express, that is, *one who directs the business on a farm and works at farm labor*. The evidence showed that the plaintiff not only, to some extent,

directed the work on his farm, but also labored at farm work. We have some authority in this state as to what constitutes total disability. Where the insured was a brakeman and also a farmer, the evidence showed that after injury he went with his train on two runs, hiring a substitute to do the braking, gave directions about his farm and performed one trivial act of labor. It was held that the question of his total disability was for the jury to determine (*Wall* v. *Casualty Co., supra*). In *James* v. *Casualty Co., supra*, the plaintiff was a wholesale and retail merchant. The evidence was to the effect that, 'he came to his place of business almost daily, when he signed checks, approved orders for goods and dictated letters.' He went on a trip to New York to buy goods, but was unable to do many of the principal matters pertaining to his business. He could not get about the store, but was compelled to sit in his office in a crippled condition. *We held that it was a question for the jury* to determine whether his disability was total. The court, in construing the language of the policy said, 'we therefore hold the contract to mean, not that the assured was rendered absolutely and literally unable to perform *any part* of his occupation, but that he was disabled from performing substantially the occupation stated in the policy.' The opinion is supported by the authorities cited therein.

"Total disability is construed to be a relative term (*McMahon* v. *The Supreme Council*, 54 Mo. App. 468). Kerr on Insurance 385, 386, defines it thus:

> 'Total disability does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists, although the insured is able to perform a few occasional acts, if he is unable to do *any substantial por-*

tion of the work connected with his occupation. It is sufficient to prove that the injuries totally disable him from the doing of *all the substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such a character and degree that common care and prudence required him to desist from his labors so long as was reasonably necessary to effect a speedy cure.'*

"Notwithstanding the evidence detailed proved that plaintiff was able to direct to some extent his business of farming and did some work himself, it tended also to show that he was wholly disabled from doing *all* the substantial and material acts necessary to be done" (italics ours).

The majority opinion simply ignores that case, followed and declared to be a leading Missouri case by the state Supreme Court in *Heald* v. *Aetna Ins. Co., supra*, separates the physical from the mental work required in one occupation, and rules that petitioner is partially but not wholly disabled. That is exactly what the Supreme Court said could not be done in the Heald case.

VII.

In ordering the district court to enter a declaratory judgment as prayed in favor of respondent without any evidence to prove the amount in dispute exceeded $3,000.00, the decision of the court below is erroneous and in conflict with the decisions of this court.

McNutt v. *General Motors Accep. Corp.*, 298 U. S. 178.

Kvos v. *Associated Press*, 299 U. S. 269.

Jurisdiction in this case was based solely on diversity of citizenship and the amount in dispute. The

petition alleged generally that the amount in controversy exceeded $3,000.00 and specifically that the controversy was in regard to $2,375.00 benefits accrued for the period intervening between May 29, 1936, and January 7, 1938, and $790.70 premiums paid (Rec. 8). The answer denied that the controversy involved more than $3,000.00. It admitted an existing controversy with respect to the disability benefits of $2,375.00 and alleged that was the sole controversy. It denied that there was or ever had been any controversy with respect to the premiums paid, $790.70 (Rec. 15). Respondent moved the court to refuse a declaratory judgment because respondent had failed to prove any controversy with respect to the $790.00 and therefore there was no evidence to prove the actual controversy involved the jurisdictional amount of $3,000.00. The trial court reserved ruling on the motion (Rec. 73-74).

Respondent made no effort and there is not a word in the record to prove there was any controversy with respect to $790.70 premiums paid. There is not a word of testimony in the record to prove there ever was any such controversy. The controversy was limited to the $2,375.00 benefits claimed. The burden was upon the respondent to prove the jurisdictional amount, failing which the case should have been ordered dismissed.

In *McNutt* v. *General Motors Accep. Corp.*, 298 U. S. 178, this court said:

> "That allegation (the allegation of the jurisdictional amount) was put in issue and the record discloses neither finding nor evidence to sustain it.

In the absence of any showing in the record to support that general allegation the question is upon which party lay the burden of proof. * * * He (the plaintiff) must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing. If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations. In the nature of things, the authorized inquiry is primarily directed to the one who claims that the power of the court should be exercised in his behalf. As he is seeking relief subject to this supervision, it follows that he must carry throughout the litigation the burden of showing that he is properly in court. The authority which the statute vests in the court to enforce the limitations of its jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof. * * * Here, the allegation in the bill of complaint as to jurisdictional amount was traversed by the answer. The court made no adequate finding upon that issue of fact, and the record contains no evidence to support the allegations of the bill. There was thus no showing that the district court had jurisdiction and the bill should have been dismissed upon that ground. The decree is reversed and the cause is remanded to the district court with directions to dismiss the bill of complaint for want of jurisdiction."

In *Kvos* v. *Associated Press*, 299 U. S. 269, the court said:

"But where the allegations as to the amount in controversy are challenged by the defendant in

> an appropriate manner, the plaintiff must support them by competent proof. * * * Since the allegation as to amount in controversy was challenged in appropriate manner, and no sufficient evidence was offered in support thereof, the bill should have been dismissed."

The judgment of the court below ordering the district court to enter a declaratory judgment as prayed in favor of respondent is therefore erroneous.

In these circumstances this question is presented: If this court should conclude that, under the Missouri law, there is substantial evidence to sustain the finding of the trial court that petitioner was totally disabled during the period for which he claims $2,375.00 disability benefits, should the judgment of the district court in his favor be affirmed or should the cause nevertheless be ordered dismissed because respondent failed to prove the jurisdictional amount?

We submit the judgment should be affirmed because respondent is conclusively bound by the allegations of its petition that more than $3,000.00 is in dispute. Proof of that fact was not necessary so far as *respondent* is concerned to give the court jurisdiction. As to it the jurisdiction of the court conclusively appears from its own allegation which it is not permitted to deny. It may not invoke the jurisdiction of the court, allege the jurisdictional amount is in dispute, try its case and suffer defeat on the merits and then claim either below or here that the judgment below should be set aside and the cause dismissed because it failed to *prove* the jurisdictional fact which it was required to

prove before it could recover a judgment against petitioner. In a word: Suppose respondent should admit in this court that the opinion of the court of appeals in *Stoner* v. *New York Life Insurance Company* was as binding as if the case had been decided by the Supreme Court of Missouri and there was sufficient evidence to sustain the finding of total disability. Would respondent be entitled to have the judgment *against* it set aside and the cause dismissed because its allegation that more than $3,000.00 was in dispute was not supported by proof? Only the defendant, who denies the jurisdictional amount, and, for that reason, the jurisdiction of the court, is entitled to a dismissal for failure to prove the allegation. The other facts warranting it, the court may enter judgment against the plaintiff without proof of jurisdictional amount because plaintiff, having alleged that the jurisdictional amount is in dispute, is not in a position to require proof of a fact which it admits.

VIII.

It is manifest the majority of the court below ruled the case, not upon the Missouri law but upon the law as they thought it should be. Years before any of the policies in this case were issued, the law in Missouri had been settled. That law became a part of each policy as if the law had been written in it. Respondent, when it issued the policies, knew the construction that would be put upon them and voluntarily issued them, assumed the risk and collected the premiums year after year. It should be required to abide by the law of the state.

We respectfully submit the writ should be issued, the cause reviewed and the judgment below reversed.

Respectfully submitted,

KENDALL B. RANDOLPH,
St. Joseph, Missouri,
Counsel for Petitioner.

With him on Brief:
R. E. CULVER,
BENJAMIN PHILLIP,
St. Joseph, Missouri.

APPENDIX A.

IN THE SUPREME COURT OF MISSOURI

September Term, 1935

In the Matter of New York Life Insurance Company, a Corporation, Petitioner,

vs.

Hopkins B. Shain, Ewing C. Bland and Robert M. Reynolds, Judges of the Kansas City Court of Appeals, Respondents.

Application for Certiorari

Petition for Certiorari and Suggestions in Support Thereof.

PETITION FOR CERTIORARI

Comes now New York Life Insurance Company, a corporation, petitioner herein, and applies for a writ of certiorari to quash the record of the Kansas City Court of Appeals in Cause No. 18429 entitled *"Lewis K. Stoner, Appellant, vs. New York Life Insurance Company, a corporation; Respondent,"* and for cause of application, states the following facts, to-wit:

That Hopkins B. Shain, Ewing C. Bland and Robert M. Reynolds compose the Kansas City Court of Appeals of the State of Missouri.

That one Lewis K. Stoner instituted in four counts an action against the New York Life Insurance Company, a corporation, petitioner herein, in the Circuit Court of Buchanan County, Missouri, in April, 1934,

which was subsequently tried in said court in November, 1934; that the plaintiff in said action sought to recover from the petitioner herein, monthly benefits alleged to be due and unpaid, accruing from October, 1933, to March, 1934, inclusive, provided for in four certain policies or contracts of insurance issued by your petitioner, to the plaintiff therein; that each of the contracts of insurance on which plaintiff sought to recover provides that plaintiff should be paid monthly benefits if by reason of bodily injury or disease he became so disabled that he was "wholly prevented from performing any work, from following any occupation or from engaging in any business for remuneration or profit," and further provided in a separate paragraph that as a distinct provision and in plain, clear and unambiguous language not in anywise conflicting with any other provision of said contract, that the insured, upon request, should furnish proof of the continuance of his total disability and "Upon failure to furnish such proofs, or *if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made nor premiums waived.*"

That at the trial of said action in the Circuit Court, as shown by the opinion filed herewith, the evidence disclosed that plaintiff was a farmer operating and managing his mother's farm under contract for one-half of the profits; that the plaintiff received injuries leaving his left ankle stiff; that during the period for which recovery is sought, the plaintiff, because of his ankle,

was unable to do manual labor in the operation of said farm but was able to manage the farm the same as he had formerly done, with the exception that he was unable to do any manual labor incident thereto; that he has received the income and profit from the farm resultant from his management and operation of the farm.

That in said trial the defendant, your petitioner, offered and the court gave an instruction on each count of said petition, said instructions being lettered "L", "M", "N" and "O", which instructed the jury that if they found the plaintiff had been able to substantially perform his duties as owner and operator of a farm, then their verdict must be for the defendant; that upon trial in the Circuit Court, the verdict was for the defendant and judgment was entered accordingly.

That upon appeal to the Kansas City Court of Appeals, the plaintiff appellant assigned error only in the giving of instructions upon the part of the defendant, whereupon your petitioner, required said court to pass upon the submissibility of plaintiff's case and to construe the provisions of the contracts of insurance.

That respondents herein constituting the Kansas City Court of Appeals heard the appeal of plaintiff, Lewis K. Stoner, and rendered judgment reversing the judgment of the Circuit Court of Buchanan County by written opinion, a copy of which is hereto attached and marked "Exhibit A"; that thereafter your petitioner seasonably filed its motion for rehearing, a copy of which is hereto attached and marked "Exhibit B"; that

said motion for rehearing was by the respondents overruled, as shown by a copy of the order overruling said motion attached hereto and marked "Exhibit C".

That the opinion and judgment of respondents in Cause No. 18429 and the record thereof ought to be quashed by this court for the following reasons:

I.

Because the respondents exceeded their lawful jurisdiction in that they failed and refused to follow the last controlling decisions of this court rendered in the cases of *State ex rel. Mutual Benefit Association* v. *Trimble,* 334 Mo. 920; *Prange* v. *International Life Insurance Company,* 329 Mo. 651, and *State ex rel. Commonwealth Casualty Company* v. *Cox,* 322 Mo. 38, wherein this court held that where the language of a policy of insurance is without ambiguity, there is no room for construction, but the unequivocal language is to be given its plain meaning; that Exhibit B hereto attached, in the Cause No. 18429, shows upon its face that the provision of the contract of insurance providing that "if the insured performs any work, or follows any occupation, or engages in any business for remuneration or profit, no further income payments shall be made," is a plain, unambiguous provision in said policy, which the respondents construed by holding that said provision means that the disability benefits should not be paid only when the insured *is able to engage* and does engage in a business, work, or occupation for profit.

II.

Because the respondents exceeded their lawful jurisdiction in that they failed and refused to follow the last controlling decisions of this court rendered in the cases of *State ex rel. Mutual Benefit Association* v *Trimble,* 334 Mo. 920; *Prange* v. *International Life Insurance Company,* 329 Mo. 651; and *State ex rel. Commonwealth Casualty Company* v. *Cox,* 322 Mo. 38, wherein this court held that where the language of a policy of insurance is without ambiguity, there is no room for construction, but the unequivocal language is to be given its plain meaning; that Exhibit B hereto attached, the opinion in Cause No. 18429, shows that the respondents, in holding Instructions L, M, N and O erroneous by construction, added a contractual liability to that contracted for by the plain, unambiguous language of the contract of insurance, in that respondent held that actual engaging in a recognized occupation, that of farm manager or operator, was not fatal to recovery and further that the insured was entitled to recover if he was unable to earn a livelihood.

III.

Because the opinion on its face shows that respondents failed to recognize and enforce the plain and unambiguous provisions of the policies, relieving the relator of liability if the insured performs any work, follows any occupation or engages in any business for remuneration or profit, which constitutes a violation of respondents' freedom to contract guaranteed by Sec-

tion 1 of the 14th Amendment to the Constitution of the United States, and by Section 30 of Article 2 of the Constitution of Missouri.

Wherefore, in the interest of the uniformity of the law of this State, your petitioner prays this court to issue a writ of certiorari directed to respondents in their official capacities, requiring them and each of them to certify to this court the true, full and complete copies of the opinion, judgment, orders, appellant's abstract of the record, briefs of counsel, and all other acts or proceedings in said cause of *Lewis K. Stoner* v. *New York Life Insurance Company, a corporation,* numbered 18329 on the docket of the Kansas City Court of Appeals, in order that this court may adjudicate upon the legality of such proceedings, and further prays the court to make such other and further adjudications and orders therein as right and justice may require.

CLARK, BOGGS, PETERSON & BECKER,
Attorneys for Petitioner.

State Of Missouri County Of Boone SS

William H. Becker, being duly sworn, upon his oath states that he is agent and attorney for the petitioner herein and as such duly authorized to make this affidavit on its behalf.

Affiant further states that the facts stated in the foregoing petition for certiorari are true and correct to the best of his knowledge, information and belief.

William H. Becker.

Subscribed and sworn to before me this 20th day of February, 1936. My term will expire January 9, 1938.

Mary S. Mitchell,
(Seal) Notary Public.

APPENDIX B.

In The Supreme Court Of Missouri September Term, 1935 State Of Missouri At The Relation Of New York Life Insurance Company, A Corporation, Relator vs. Hopkins B. Shain, Ewing C. Bland and Robert M. Reynolds, Judges Of The Kansas City Court Of Appeals, Respondents No. 34813.

Certiorari.

Now at ths day, on consideration of the petition for a writ of certiorari herein to the said respondents, it is ordered by the court here that the said petition be and the same is hereby denied.

State Of Missouri, SCT.

I, E. F. Elliott, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Term thereof, 1935, and on the 18th day of March 1936, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 11th day of September 1939.

E. F. Elliott,

(Seal) Clerk.

_____ D. C.